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No. 82-2126

In The

# Supreme Court of the United States

October Term, 1982

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T.H. Bell, Secretary of Education,
*Petitioner*

v.

State of New Jersey

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T.H. Bell, Secretary of Education,
*Petitioner*

v.

Commonwealth of Pennsylvania

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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## BRIEF FOR RESPONDENT COMMONWEALTH OF PENNSYLVANIA

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## QUESTIONS PRESENTED

1. Whether in implementing statutes with express enforcement provisions federal agencies nevertheless have inherent or implied power to require states to reimburse the federal treasury for funds expended in the operation of a grant program.

2. Whether the enforcement provisions enacted in the Education Amendments of 1978, which have been superseded by more recent law, can be applied retroactively to sanction grant programs conducted between 1970 and 1973.

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COMMONWEALTH OF PENNSYLVANIA

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF FOR RESPONDENT COMMONWEALTH OF PENNSYLVANIA

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### STATUTES AND REGULATIONS INVOLVED

Relevant provisions of Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C.A. §§ 241a-241m (1974), and pertinent regulations issued thereunder, 45 C.F.R. § 116 (1972); the General Education Provisions Act, Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970); the Education Consolidation and Improvement Act of 1981, 20 U.S.C.A. §§ 3801-3876 (Supp. 1982); and the Debt Collection Act of 1982, Pub. L. No. 97-365, § 10(2), 96 Stat. 1754-55 (1982), are reprinted in the Appendix, *infra*, 1a-13a.

## STATEMENT

In this case, an administrative agency is asserting that it has inherent power, independent of any statutory authority, to require state grant recipients to pay a financial penalty for past programs with which the agency, in retrospect, is not satisfied. The case arises in the context of the Title I [1] grant program administered during the relevant period by the Office of Education (OE or agency) of the Department of Health, Education, and Welfare (HEW).[2] At issue are the Title I programs conducted by local school districts, called Local Educational Agencies (LEAs), in Pennsylvania between 1970 and 1973 which HEW auditors took exception to as having failed to com-

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[1] Title I of the Elementary and Secondary Education Act of 1965 (ESEA) is currently codified, as amended, at 20 U.S.C.A. §§ 2701-2854 (Supp. 1982). Because the programs at issue in this case were conducted between 1970 and 1973, and, due to frequent amendment, the Title I statute in effect during those years contains some significant differences from the present law, much citation in this brief will be to the law in effect at the time. The Title I statute in the form it took during those years is still codified at 20 U.S.C.A. §§ 241a-241m (1974), in the unsupplemented volume. For ease of reference, this brief will cite to that volume and to the appendix of this brief where the relevant portions of the law are set out verbatim. Appendix to Brief of Respondent, Commonwealth of Pennsylvania (Pa. App.) 1a through 13a.

Effective October 1, 1981, Title I was replaced by Chapter 1 of the Education Consolidation and Improvement Act of 1981 (ECIA), 20 U.S.C.A. §§ 3801-3807, 3871-3876 (Supp. 1982). Except for provisions enumerated in § 3803(a), (b) of the ECIA, Congress specifically directed that the provisions of Title I are not applicable to the Chapter 1 program. 20 U.S.C.A. § 3803(c) (Supp. 1982).

[2] OE was predecessor to the present Department of Education, and was a division of HEW. OE was headed by the Commissioner of Education. On May 4, 1980, OE's responsibilities were transferred out of HEW to a newly created Department of Education and the powers previously exercised by the Commissioner were assumed by the new Secretary of Education. 20 U.S.C.A. §§ 3411, 3441 (Supp. 1982). Because all substantive matters affecting this case occurred prior to the establishment of the Department of Education, references will be to OE and the Commissioner.

ply with their interpretation of technical regulatory requirements.

Title I was enacted in 1965 to provide grants to LEAs to meet the special educational needs of children residing in low-income areas, and to defuse the impact that concentrations of low-income families have on the ability of LEAs to support adequate educational programs, by financing the expansion and improvement of their programs. 20 U.S.C.A. § 241a. At the time of Title I's passage, Congress was deeply concerned about the adverse effect of poverty on educational development. It was the prevailing belief in Congress that education was the key that would free disadvantaged children from the cycle of poverty. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1450.

Congress proposed to achieve its goals by establishing programs at the school district level that would be designed specifically to reach those in the school population where poverty impeded learning. The theory was that people from poverty stricken areas had failed to benefit from the regular educational system because educational programs were generally aimed at the achieving student and overlooked the special needs created by poverty. By encouraging programs that would be aimed solely to reach that previously neglected population, Congress hoped to achieve a more effective education with all its attendant advantages for a broader range of Americans. *Id.* at 1454.

As was noted by the Third Circuit, Title I is unique in its attempt to affect education at the local level throughout the country. Pet. App. 5a-7a, 17a. Education has historically been controlled at the local level and imposing federal goals on widely diverse localities to achieve a national purpose is a delicate operation. In order to preserve the structure and value of local control, Congress devised a system whereby the grant would be made to the State Educational Agency (SEA) to be distributed to

LEAs which had received approval from the SEA of their application for funds.

Although the SEA was responsible for fiscal control and fund accounting procedures to assure proper disbursement, and for initiating procedures to assure that the LEAs were using the money for approved programs,[3] the programs themselves were to be left to the discretion and judgment of the LEAs in order to accommodate diversity. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1454. In practice, the Title I program has been paid in advance, as opposed to being paid by way of reimbursement, with grant funds being made available to the LEAs prior to the commencement of the school year.[4] This is consistent with the Act's purpose to assist areas where high concentrations of poverty render a school district especially limited in its capacity to provide additional or specialized programs.

Since it was unknown what would be effective in reaching the target population, Congress encouraged flexibility,

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[3] S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1453. Also, the SEA was required to provide assurances to the Commissioner according to 20 U.S.C.A. § 241f, Pa. App. 1a. Title I was the only ESEA program without the requirement of a state plan.

[4] The significance of the difference between an advance-funding scheme and payment by way of reimbursement for services already rendered is discussed in the Third Circuit's Opinion. Pet. App. 21a, 22a. In a reimbursement program, use of setoff against program funds held by the agency does not affect either the grant recipient's budget or the beneficiaries' program. In other words, because the setoff is against future program funds, no expenditures outside the program's coverage need be made. In contrast, setoff against an advance-funded program, or even an advance installment payment as in Title I, 45 C.F.R. § 116.43(b) (1972), requires expenditures from a grant recipient's own treasury to prevent a cut-back or failure of the program during the year for which the funds were intended. Obviously, this destroys Congress's objectives in its program.

innovation, and creativity in the programs. *Id.* at 1454-56. In connection with this experimental approach, Congress provided for evaluation of the programs to monitor their effectiveness and to provide a basis for future adjustment both by Congress and the program administrators. *Id.* at 1459. It is quite clear from the legislative history that Congress expected Title I to be around for a long time to accomplish its purpose. Future adjustments to the program were anticipated as was the need to pay close attention to such factors as program results and developing educational theories.

The enforcement scheme established to ensure compliance with the requirements of the Title I statute was consistent with the purpose and direction of Title I. Remedies were structured into the Title I statutory scheme which permitted the exercise of control over the programs without jeopardizing them or limiting their effectiveness. This enforcement scheme gave the Commissioner authority to disapprove an application for grant funds submitted by the SEA [5] or to withhold funds when, after notice and hearing, he finds a failure to comply substantially with Title I requirements. 20 U.S.C.A. § 241j, Pa. App. 2a. Funds may only be withheld under this provision, however, until the Commissioner is satisfied that there is no longer such failure to comply. This is a particularly compelling remedy: it forces a grant recipient to bring its program into line or lose it.

There is no provision in the statute requiring the reimbursement of the United States Treasury for grant funds that were expended on Title I programs. Title I was amended frequently—every other year—but it was not until 1978 that Congress added the penalty of repaying misspent or misapplied grant funds based on audit exceptions. 20 U.S.C.A. § 2835 (Supp. 1982). The frequent amendments to Title I were made pursuant to re-

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[5] 20 U.S.C.A. § 241f, Pa. App. 1a.

evaluations of the program based on regular reports and in fulfillment of Congress's original intention to review the program design completely before continuing it. H.R. Rep. No. 1814, 89th Cong., 2d Sess. 5., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3847.

No regulation was ever promulgated by OE in support of its assumption of powers outside the statute. At the time the audits of Pennsylvania's Title I program were conducted and at the time the demand for refund was issued by OE, the agency was subject to statutory controls pertaining to generally applicable requirements prescribed by the Commissioner. The General Education Provisions Act (GEPA)[6] required regulations to be published in the *Federal Register*[7] with citation to the legal authority upon which they were based[8] before they could take effect. The agency was also admonished by statute to enforce its regulations uniformly throughout the states. 20 U.S.C.A. § 1232(c).

Despite the concern apparent in the statute that the agency act with authority and control, the agency set upon a course of conduct directed to enforcing its demand for reimbursement of expended grant funds without the authority of either statute or regulation. It gratuitously formed the Title I Audit Hearing Board in late 1972 to hear audit disputes. The hearing board was never formally established by regulation but was simply announced in a Notice published in the *Federal Register*, 37 Fed. Reg. 23,002 (1972), thereby avoiding the inconvenience of following rule-making requirements. Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970), § 421, *as*

[6] GEPA is applicable to Title I. 20 U.S.C.A. § 1221(b). Citations to GEPA are to the 1978 volume of U.S.C.A., not the supplement, since the version of the law contained therein more closely reflects the provisions in effect during the period the subject programs were in operation.

[7] 20 U.S.C.A. § 1232(b)(1).

[8] 20 U.S.C.A. § 1232(a)(2).

*amended* 20 U.S.C.A. § 1232 (Supp. 1982), Pa. App. 6a. The Notice pertaining to the hearing board was later amended by another Notice, 41 Fed. Reg. 28,568-69 (1976), which was made applicable to proceedings in progress at the time. No authorizing regulations ever empowered this board to act. The first validly promulgated regulations on the subject of reimbursement of federal grants and procedures to implement such a penalty appeared in 1981,[9] subsequent to the Education Amendments of 1978 which contained a provision authorizing the repayment penalty. 20 U.S.C.A. § 2835 (Supp. 1982).

In 1972, prior to the conclusion of the programs in question and well before the first audit report was issued, GEPA was amended to limit the authority of OE to the express terms of its authorizing statute.[10] Congress's continuing concern that OE was assuming powers for itself far beyond the statutory boundaries was reflected in the 1974 amendments to GEPA. These amendments clarified more details with respect to publication of agency rules and required the submission of final regulations for congressional review before such regulations could become effective and enforceable. 20 U.S.C.A. § 1232(b)(2), (d) through (g). It is clear that Congress was becoming more and more concerned to maintain close control of the agency designated to enforce its programs.

Pennsylvania has participated in the Title I program since its inception. As in any state, participation in Title I is not without cost to the grant recipient. Al-

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[9] 46 Fed. Reg. 27,304 (1981).

[10] "The Office of Education shall not have authority which is not expressly provided for by the statute or implied therein." Pub. L. No. 92-318, § 403(a), 86 Stat. 327 (1972). This section was later amended to read: "The Office shall have such responsibilities and authorities as may be vested in the Commissioner by law or delegated to the Commissioner in accordance with law." 20 U.S.C.A. § 1221c(a).

though federal grants may be popularly viewed as largesse, to receive the benefits the state grantee must comply with various mandates of federal law resulting in substantial expenditures beyond the simple administration of the program. *See* Note, *Federal Grants and the Tenth Amendment: "Things as They Are" and Fiscal Federalism*, 50 Fordham L. Rev. 130, 135, 148 (1981); 2 R. Cappalli, Federal Grants and Cooperative Agreements, § 11:11 at 23 (1982). One costly provision in Title I is the requirement that eligibility for Title I funds demands that the SEA and each LEA continue to maintain fiscal effort. 20 U.S.C.A. § 241g(c)(2). This means that the school district must expend as much money on the program of instruction provided with state and local funds for each year that Title I is offered as it did during each of the preceding two years. Educational expenditures in an LEA are thereby frozen at the highest level they have ever attained for the period of time that Title I programs are offered.

The audit exceptions forming the basis of this case are against programs conducted in four school districts in Pennsylvania commencing with the school year in 1970 through the end of the school year in 1973. Personnel from the audit agency of HEW visited the school districts in 1971 and again in 1973. There they conducted a program review that went considerably beyond any fiscal audit. On the basis of interviews with staff, observation of program operation, review of program design and objectives, studies of demographic data and the like, the auditors subjectively evaluated the program to determine whether its interrelationship with the regular course of instruction violated any program standard established by OE.[11] By this time, OE had promulgated voluminous, detailed and ambiguous regulations channeling and conforming Title I programs into a national

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[11] Annual fiscal audits of LEA expenditures were a required aspect of SEA fiscal control. 45 C.F.R. § 116.48 (1972), Pa. App. 5a.

stereotype.[12] Numerous conflicting pamphlets purporting to direct program design also issued from OE over the period. Any deviation from the standard that the rule sought to define was noted by the auditors as an exception.

Relying on these publications, the auditors visiting the Pennsylvania LEAs found programs which conflicted with their interpretation of two prohibitions: services to ineligible schools and services providing general aid. Initially, two districts were cited for serving ineligible schools. Regulations required specified concentrations of poverty to prove eligibility before Title I services could be offered. 45 C.F.R. § 116.17 (1972). Concentrations of poverty were determined on the basis of data which were often unavailable or out of date. Furthermore, identification of eligible schools was based on estimates. The combination of these factors led one of the school districts in question to make estimates based on sources which the auditors found unacceptable.

The other school district faced with this violation had implemented a districtwide busing system to achieve racial integration. With the distinctions thus blurred between areas with or without concentrated poverty, the school district's attempt to follow the bused children with Title I services by supplying them in their new locations was criticized by the auditors and resulted in an audit exception.

The second prohibition at issue in this case was that against providing Title I services for the general aid of

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[12] For an example of an ambiguous regulation, 45 C.F.R. § 116.17 (1972) titled "Project covered by an application," has been read by the auditors to prohibit the use of grant funds for general aid. Portions of this regulation are set out in Pa. App. 3a. Far from putting an LEA on notice as to what is prohibited by this regulation, the best that can be said is that it does not address the issues raised in a school district which is busing for desegregation, a situation which existed in both the Pennsylvania LEA's that were cited for violation of this regulation.

other students in the school population besides Title I eligible students, rather than concentrating the services exclusively on the eligible students. 45 C.F.R. § 116.17 (1972). Audit exceptions asserting violation of this prohibition named two school districts, one of which was undergoing a massive desegregation effort at the time of its audit. With respect to both of these school districts, the Audit Hearing Board Panel made the same finding: personnel hired to implement the Title I program, although specifically functioning to provide services that benefited the eligible students, did not restrict themselves exclusively to working directly with Title I identified children. The fact that the programs were created to serve the needs of the eligible population and that population was specifically directed to the Title I personnel, and did receive services, did not, in the view of the auditors, compensate for neglecting to isolate the Title I youngsters in an exclusive program.

The special problems these districts faced in isolating their Title I students, particularly in the districts undergoing desegregation, were remarked by the Audit Hearing Board Panel that heard Pennsylvania's case. Pet. App. 71a. The strength and value of the programs were recognized and complimented. Pet. App. 71a, 72a, 73a. The panel, however, felt compelled to disregard the merits of these programs in favor of laying down what it perceived to be the letter of the law in strict adherence to the regulations. In the view of OE and the panel, no quarter could be given to the unique circumstances of Title I participating school districts.

During the period of time that the audits covered, there was conflicting direction to both the LEAs and the SEA regarding what constituted acceptable Title I programs. Tr. 416-430, 437. Even after the HEW auditors reviewed Pennsylvania's Title I program in 1971 and presumably found substantial defects, there was no timely assistance offered. Rather than advising the SEA on the areas of noncompliance which were identified, the audi-

tors permitted the continued operation of what they considered a defective program, and the consequent accumulation of supposed misexpenditures, and did not issue their audit report until 1975. Tr. 458, J.A. 54.

Furthermore, OE program reviewers visited the Title I program in Pennsylvania each year and, although they made suggestions for improvement which were immediately implemented, never identified defects that required the imposition of the statutory penalty of withholding. Pennsylvania was permitted to continue running its Title I program for years in a manner that was later claimed by OE to be so improper that the United States should be reimbursed for the enabling grant.[13]

When informed of the basis for the audit exceptions in this case, the LEAs immediately revised their programs to eliminate any objectionable features. Tr. 456, 458. Pennsylvania and its LEAs have always sought in good faith to comply with all Title I requirements and, since correction of the offending projects in 1973, Pennsylvania has maintained full compliance with the Title I law.

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[13] This initially resulted in a huge audit exception of around $10.9 million. J.A. 59, 60. Persistent review, sought by Pennsylvania at various levels, gradually reduced this figure to the present amount claimed: $422,424.29. Pennsylvania's experience in this regard suggests that the figures claimed by the agency to be owing as a result of audit exceptions are vastly inflated. This figure represents only .1% of Pennsylvania's total grant for the years in question, contrary to the allegation in petitioner's brief at 10 and 42 that substantial misexpenditures are at issue.

## SUMMARY OF ARGUMENT

The Title I statute provides for a complete and effective enforcement scheme which precludes the use of any extra-statutory penalty. The statute imposes various responsibilities for the achievement of its purpose on the parties to the grant and provides for their enforcement by granting the agency power to disapprove applications for funds and to withhold funds from noncomplying programs until they are corrected. When a statute imposes a liability and prescribes a remedy to enforce it, as the Title I statute has in this case, that remedy is exclusive.

The statutory provisions for withholding of funds, available to the administrative agency in Title I, is particularly effective in compelling compliance with the agency's requirements. The careful construction of Title I, noted in the Third Circuit's Opinion, is designed solely to achieve one end: that of educating economically disadvantaged underachievers. It is no mistake, therefore, that the enforcement mechanism built into this structure is therapeutic rather than punitive. It insures the success of the program by withholding funds until compliance is achieved instead of crippling it by requiring reimbursement of prior grants, whether by offset or other means.

Administrative agencies can act only to the extent they are given power by their authorizing statute. As creatures of statute, agencies are bound to implement the powers dictated by Congress. It is the agency's obligation to enforce a statute according to its terms. In this case, it was the agency's obligation to notify Pennsylvania of any programs that failed to comply substantially with the statute and to withhold funds only until satisfied that compliance was achieved. This remedy was not only an obligation but also a limitation to the agency. The agency has no power to substitute its own judgment for that of

Congress by using an enforcement scheme not contemplated in the statute.

Any inherent power the United States government has to collect repayments of federal funds erroneously or illegally paid is inapplicable here. The payments at issue here were supplementary to the LEAs' regular school program. None of the Title I funds for the years in question have been retained by the SEA nor has the SEA been financially enriched by its participation in Title I, unjustly or otherwise. Pennsylvania's Title I grant is not a debt subject to common law repayment powers. Any challenges to the legitimacy of Pennsylvania's Title I program must be exercised according to the statutory design.

The petitioner's brief suggests that the agency simply seeks authority to setoff amounts allegedly misspent against future grant payments. If such a right to offset exists, it cannot be perverted into a power to require state reimbursement of federal funds or to permit federal control over state expenditures in its educational programs. In this regard, the Federal Claims Collection Act cannot be cited for authority that the agency otherwise lacks. Originally enacted primarily to permit agencies to accept voluntarily tendered payments in settlement of claims, the Federal Claims Collection Act has always been directed to resolution of claims by or against individuals. The most recent amendment to this Act, authorizing agencies to collect claims by means of administrative offset, specifically excludes states from its reach.

Finally, there is no legal authority to support the retroactive operation of the repayment provisions found in the Education Amendments of 1978. If the Court applies the law in effect at the time it renders its decision, the Education Consolidation and Improvement Act of 1981 applies to what were previously Title I programs. This Act

specifically declares the repayment provisions of the 1978 Amendments inapplicable.

If any part of either the 1978 Amendments or the ECIA should be applied retroactively, it would be that aspect of the law which is curative or remedial. The beneficial provisions giving greater discretion to LEAs to conceive and implement their Title I programs in harmony with local goals and priorities could be applied retroactively. Under these standards, Pennsylvania's programs of 1970 through 1973 would be complying.

Elements of the 1978 Amendments which increase the liability of grant recipients, or change the terms on which the grant of funds were originally premised by requiring reimbursement, are not applicable retroactively. The rule is that legislation is prospective only. It is in the interest of justice that parties' legitimate expectations based on the law at the time they acted be given effect. The Third Circuit correctly found that this is particularly true with respect to grants which subject participating states to burdensome conditions. Since the only control a state can exercise is to decline to participate in the grant relationship, it is essential that the terms of its participation are clearly expressed and not subject to implication or later amendment. A state's agreement to subject itself to the express conditions in the grant is not effective consent to conditions which are later enacted or implied.

## ARGUMENT

### I. THE TITLE I STATUTE PROVIDES COMPLETE AND EFFECTIVE REMEDIES FOR ITS ENFORCEMENT WHICH EXCLUDE AN UNSTATED SANCTION OF REIMBURSEMENT.

#### A. Administrative Agencies are Limited to the Powers Expressed in the Statute.

The distinguishing attribute of an administrative agency is its total dependence on its authorizing statute. An agency is a creature of statute and, for any of its conduct, derives its power solely from the law by which authority it is acting. Its reach is always coextensive with the authority of a statute; it cannot exceed the statute's limitations. *Peters v. Hobby*, 349 U.S. 331 (1955); *Jones v. SEC*, 298 U.S. 1 (1936); *FTC v. Raladam Co.*, 283 U.S. 643, 649 (1931); *Morrill v. Jones*, 106 U.S. 466 (1882); *Sioux Valley Empire Electric Ass'n v. Butz*, 504 F.2d 168 (8th Cir. 1974); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973).

Congress dictates an agency's direction and declares the purpose of its existence; "the determinative question is not what the Board thinks it should do but what Congress has said it can do." *CAB v. Delta Airlines, Inc.*, 367 U.S. 316, 322 (1961). Thus, an agency is required to implement a statute according to its purpose and, when it takes action, such action must be founded upon the proper basis of Congressional authority and not mere good intention, personal insight, prejudice or predilection. *Dixon v. United States*, 381 U.S. 68, 71 (1965); *Oregon & California R.R. v. United States*, 238 U.S. 393 (1915); *Duke City Lumber Co. v. Butz*, 382 F. Supp. 362 (D.D.C. 1974); *aff'd*, 539 F.2d 220 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 1039 (1977).

The implication of powers not expressed in the statute is subject to an extremely heavy burden. An agency which would go outside the terms of the statute must demonstrate that such power is practically indispensable

and essential to execute the authority expressly conferred. It is not sufficient to show that the implied power is merely advantageous, convenient, or effectual in the exercise of the expressed power. 2 A. Sutherland, Statutory Construction, § 55.03 (4th ed. 1973); *see Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981); *Milwaukee v. Illinois*, 451 U.S. 304 (1981). Where Congress speaks with particularity and specificity, rather than with broad and permissive terms, its purpose to confine the boundaries of the agency's delegated authority to the terms of the Act can be assumed. *Zuber v. Allen*, 396 U.S. 168 (1969). Attempts by the agency to make its own law will be deemed a nullity. *Dixon v. United States*, 381 U.S. 68, 75 (1965); *School Board v. HEW*, 525 F.2d 908 (5th Cir. 1976).

### B. The Remedy Expressed in a Grant Statute is Exclusive.

A corollary to the fundamental principle that an administrative agency is restricted to the authority conferred by statute is the principle that the expressed remedy in a statutory scheme is exclusive.

> A general liability created by statute without a remedy may be enforced by an appropriate common law action. But where the provision for the liability is coupled with a provision for a special remedy, that remedy, and that alone must be employed.

*Pollard v. Bailey*, 87 U.S. 520, 527 (1874); *accord, National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453 (1974). The logical basis of this principle is that in developing the statutory scheme, Congress provided precisely the remedy it considered appropriate. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981). When Congress intends to supply a particular remedy, it is well aware of how it may effectuate that intent. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

It is not up to either the executive or judicial branch of government to improve on Congressional action. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); *Globe Newspaper Co. v. Walker*, 210 U.S. 356 (1908). If an enforcement mechanism provided in a statute is not everything an agency would like it to be, the recourse is to express that opinion to Congress and seek a change in the law. Nor is the fact that the agency can think of an additional remedy, not available in the statute, meaningful as an indication of some deficiency. This Court has noted "[f]rom the defects of a provision we can deduce nothing nor on account of them substitute one of greater efficacy." *Oregon & California R.R. v. United States*, 238 U.S. 393, 420 (1915).

Where Congress has acted to provide a remedy, the agency has express authority to that extent and there is no need to imply authority to use any other remedy. An agency is not at liberty to declare that a hiatus exists in the law simply because it does not find there the penalty it wishes to impose, and then assume for itself some implicit authority found lurking in the gap. *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *Touche Ross Co. v. Redington*, 442 U.S. 560, 578 (1979). Congressional silence is strong evidence that it did not intend to grant a particular power, especially when express authority has consistently been granted in other contexts. *Milwaukee v. Illinois*, 451 U.S. 304 (1981); *State Highway Comm'n v. Volpe*, 479 F.2d 1099, 1114 (8th Cir. 1973).

### C. It is Inconsistent with the Title I Statute to Require Reimbursement of Expended Grant Funds.

#### 1. *The statutory withholding remedy effectuates the purpose of the grant.*

In Title I, Congress nicely balanced the respective obligations of the federal agency and the state to provide money to LEAs for the education of the disadvantaged. To enforce the obligations of the grant, Congress author-

ized the agency to employ two remedies. One, application disapproval, is to be utilized when a state's application fails to conform to the requirements of the statute. 20 U.S.C.A. § 241f(b), Pa. App. 1a. The other, withholding of funds, requires the Commissioner to suspend payments to a state which is substantially out of compliance with the requirements of the statute until he is satisfied there is no longer a failure to comply. 20 U.S.C.A. § 241j (1974), Pa. App. 2a. Neither of these two remedies has ever been enforced against Pennsylvania.[14]

Should it ever be used, withholding of funds could be an extremely effective remedy. Notification that Title I funds would not be available until the Commissioner is satisfied with the program would make an LEA eager to comply with the agency's directions whether it agreed with them or not. Both the SEA and the LEAs in Pennsylvania have always been willing to adopt the recommendations made by agency personnel in order to keep the Title I program intact. If an LEA's receipt of Title I funds were contingent on its conformity to the agency's recommendations for future programs, the SEA and the school district would be under a great deal of public pressure [15] to comply promptly and to ask questions later. This enforcement method would tend to put petty disputes in perspective and eliminate much of the wasteful and protracted litigation with which Title I has been encumbered.[16]

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[14] Regulations were issued on September 15, 1965, implementing these remedies contemporaneously with the statute. *See* 45 C.F.R. § 116.51 (1972), and § 116.52, *as amended* § 116.52(b) (1972).

[15] *See* 20 U.S.C.A. § 241(*l*), establishing National Advisory Council on the Education of Disadvantaged Children; 45 C.F.R. § 116.17(o)(1) (1972), establishing Parent Advisory Councils at the local level.

[16] As of 1980, at least 26 states had pre-1978 audit cases still pending. The average audit case at that time had been pending for 8 years. *To Dismiss Certain Cases Pending Before the Educa-*

The enforcement methods expressed in the statute are consistent with the goal of correcting the program and advancing the purpose of the grant. S. Rep. No. 91-634, 91st Cong., 2d Sess. 10 (1970). The purpose of Title I is not only to provide a heretofore unavailable educational opportunity to disadvantaged youngsters, but also to build on gains achieved as the child advances through the program. The inspiration to provide such a program comes in the form of an annual grant passed through the SEA to the individual LEA recipients which are responsible for the program. Since the value of this type of program is in its continuity, Congress expected to see it continue year after year. Enforcement methods which cause disruption or forfeiture of the grant are therefore not desirable. *Cort v. Ash*, 422 U.S. 66, 84 (1975).

The enforcement powers expressed in the statute are consistent with Congress's expectation. By its terms, the withholding remedy is focused on the correction of any substantial noncompliance by an LEA.

> Whenever the Commissioner . . . finds that there has been a failure to comply substantially with any assurance set forth in the application approved . . . , the Commissioner shall notify the agency that further payments will not be made to the State . . . until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State . . . .

20 U.S.C.A. § 241j.

This language is mandatory: it requires the Commissioner to act in a case of substantial noncompliance by withholding funds. But it also compels correction of the program: payments will be withheld until there is no longer any such failure to comply. Clearly this language

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*tion Appeal Board: Hearings on H.R. 8145 Before the Subcommittee on Elementary, Secondary, and Vocational Education of the Committee on Education and Labor*, 96 Cong., 2d Sess. 32 (1980).

provides a therapeutic, as opposed to a punitive, measure of enforcement.[17] The point is not to acquire money from the states but to provide education to the disadvantaged.[18]

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[17] *See* Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

[18] The petitioner's brief raises the fear that the remedies available in the statute are not sufficiently severe to discourage or compensate for egregious violations of the statute. The Brief of Amicus Curiae in Support of Petitioner makes references to theft of funds and wrongful conversion while the petitioner's brief considers the funds squandered and wrongfully retained. It is apparent from the facts in the present case that these terms do not describe the audit exceptions brought against Pennsylvania. The discussion in this brief at 8-11 makes clear that the audit exceptions resulted from differences between the LEAs responsible for program implementation and the visiting auditors in interpreting ambiguous regulations.

Nevertheless, in a Title I program implemented in 505 LEAs in Pennsylvania, by thousands of employees, substantial error, or even dishonesty, is possible. In those cases, the United States is not without remedy. Fraud, theft, or other conduct rising to criminal dimensions is punishable through the criminal law. *See* United States v. Farrell, 418 F. Supp. 308 (M.D. Pa. 1976). Civil fraud actions would permit recovery in such cases. United States v. Borin, 209 F.2d 145 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954). In circumstances where the ultimate beneficiaries of the program perceive harm, third party actions can be instituted. *See* Wheeler v. Barrera, 417 U.S. 402 (1974). Also, the Civil Rights Act of 1964 would provide a remedy if program error resulted in discrimination. 42 U.S.C.A. § 2000d. Lau v. Nichols, 414 U.S. 563 (1974).

The most effective enforcement method could be the provisions for policing the grant which are structured into the statute. Public attention to the expenditures under the grant is assured by the provision for public complaints, 45 C.F.R. § 116.31(g) (1972), as well as the National Advisory Council and Parents Advisory Councils.

The agency also has substantial responsibility for guiding Title I administrators to a correct application of the law. Such prospective grant enforcement is both effective and common. *See, e.g.*, Lopez v. Luginbill, 483 F.2d 486 (10th Cir. 1973), *cert. denied*, 415 U.S. 927 (1974); Board of Public Instruction v. Finch, 414 F.2d 1068 (5th Cir. 1969).

In contradistinction to this carefully designed and beneficent remedy, the unexpressed and unrestrained penalty of reimbursement is not effective in achieving a proper education program. It encourages disputes, not correction, because it focuses on past efforts and not on the future. The SEA and LEAs are not encouraged to correct their program in the future but instead to defend their past practices in order to save their grant. Such large sums are involved that program administrators have no choice but to litigate, thus magnifying petty errors and disagreements in an effort to justify their decisions.

An adverse decision requiring reimbursement of past grants does nothing to help, and much to hurt, the current program. If the money is recovered by means of setoff against the current grant, there quite simply will be less money available to fulfill the purpose of the grant. If the money comes out of scarce state and local resources, the same result obtains. If reimbursing past grants becomes too expensive, the least affluent LEAs, and perhaps even the SEA, may no longer be able to afford to participate in Title I. This, of course, would complete the total destruction of Congress's purpose.

### 2. *Reimbursement of grant funds is inconsistent with the withholding remedy.*

The remedy provided by the statute in cases of substantial noncompliance is comprehensive and therefore precludes the intrusions of additional, unexpressed remedies. In enacting Title I, Congress considered the problem of noncompliance and prescribed withholding of funds as a remedy. The requirement of program compliance coupled with the remedy of withholding occupies the field [19] and leaves no room for implication or common law. *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 94 n.30 (1981); *Transamerica Mort-*

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[19] Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n, 453 U.S. 1 (1981); Pollard v. Bailey, 87 U.S. 520 (1874).

*gage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19-20 (1979); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

The fact that Congress chose to apply the remedy only to instances of substantial noncompliance, and designed the enforcement tool to affect future payments only, does not prove a gap in the enforcement scheme. "The question is whether the field has been occupied, not whether it has been occupied in a particular manner." *Milwaukee v. Illinois*, 451 U.S. 304, 324 (1981). The agency's demand for reimbursement in cases of insubstantial violations and in cases where the grant funds have been expended is not filling a hiatus in the statutory scheme; it is simply creating a different scheme outside of the statute.

The penalty of reimbursement is actually in conflict with the terms of the statutory provision for withholding. When substantial noncompliance is found, the Commissioner is required by the terms of the withholding provision to make no further payments until he is satisfied that there is no longer such failure to comply. The language is mandatory. It requires the agency to act by withholding funds when substantial noncompliance is found. Failing to withhold funds in such circumstances is not a prerogative of the Commissioner.

Similarly, the statute requires that the withheld funds be released when the LEA can satisfy the Commissioner that the program is again complying. Again, this is not a matter left to the agency's discretion: OE cannot continue to withhold funds against a complying program on the theory that it is entitled to reimbursement. It is inconsistent to assume that the agency has power to require reimbursement of Title I funds, or offset against such funds, when the statute itself so clearly requires the Commissioner to fund complying programs. *Oregon & California R.R. v. United States*, 238 U.S. 393, 417, 435-36 (1915); *School Board v. HEW*, 525 F.2d 908 (5th Cir. 1976).

The remedy of withholding envisions a suspension of funds to encourage the LEA to bring its program back into compliance. Enforcement is thus perfected: compliance is achieved without harm to the program. A demand for reimbursement flies directly in the face of this structure. The agency assumes the power either to seize program funds or to demand a direct payment from the state treasury, whether the program has been corrected or not. There is no longer any purpose in withholding funds until the Commissioner is satisfied with the program if those very funds are subject to reimbursement. There is no pressure on the LEA to bring its program into compliance. The withholding remedy provided by statute is completely undermined and negatived by OE's preference for reimbursement, a penalty not even considered in the law.[20]

### 3. *An undefined reimbursement penalty is contrary to Title I's careful structure.*

The enforcement mechanisms were built into the Title I statute in such a way that the recipient was protected from arbitrary agency action. The statutory remedies are hedged with a procedure requiring reasonable notice and opportunity for a hearing as well as judicial review. 20 U.S.C.A. §§ 241f, 241j, 241k, Pa. App. 1a, 2a. Additionally, the agency was limited in its use of the withholding remedy to circumstances where it could prove substantial noncompliance.

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[20] If Congress wanted to penalize the SEA for past noncompliance, and not simply achieve effective program operation by insuring program compliance, it could have coupled the withholding remedy with a repayment provision to be used in appropriate circumstances. This was done in the School Construction in Areas Affected By Federal Activities Act. Withholding was permitted, but was not mandatory, where substantial noncompliance was found until correction was achieved. If correction was impossible, withholding of funds continued until repayment of improper expenditures had taken place. 20 U.S.C.A. § 641.

The absence of a corollary restriction generally utilized in connection with a power indicates the absence of that power. *Middlesex Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20-21 (1981); *Alcoa S.S. Co. v. Federal Maritime Comm'n*, 348 F.2d 756 (D.C. Cir. 1965); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973). It is not logical to assume that Congress intended to empower OE to require reimbursement of grants, a penalty more severe than any provided in the Act,[21] and not only failed to provide procedural protections in connection with its implementation but also failed to mention it entirely. *Transamerica Mortgage Advisors Inc. v. Lewis*, 444 U.S. 11, 19-21 (1979). Congress's interest in protecting the program, the grantees, and the beneficiaries from an overreaching agency is apparent from the built-in protections which accompany the enforcement provisions. These protections become meaningless if the most severe penalty of all can be wielded by the agency without restriction. It is senseless to assume that the agency can avoid a process designed to protect the grantee by the simple expedient of utilizing a more severe penalty than that expressed in the statute. *Oregon & California R.R. v. United States*, 238 U.S. 393, 419-22 (1915).

Because sovereign states are grantees under Title I, particular care must be taken to see that protections are written into the statute. The petitioner argues in his brief at 27 that states have no constitutional right to due process. This perceived freedom from any obligation to provide due process to states is seized upon by the agency as a basis for imposing penalties with impunity once it is permitted to go beyond the statute to find its power. For example, although the petitioner now argues to this Court that grantees aggrieved by final agency action may ap-

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[21] Reimbursement of grant funds already spent has been recognized as the most severe penalty, surpassing even the denial of further funding. Davis v. HUD, 627 F.2d 942 (9th Cir. 1980).

peal to federal courts,[22] it has argued the contrary position before the circuit courts and the Title I Audit Hearing Board. Its position in these lower tribunals was logical: because the penalty it was invoking was beyond the statute, no statutory protections applied.[23] Here we find a demonstration that the agency's willingness to appear reasonable, even generous, in theory can turn to punitive rigidity in practice if not controlled by statutory restraints.

The later amendment of Title I to include a reimbursement penalty is further evidence that the early Title I statute should be given a different construction. *United States v. McClure*, 305 U.S. 472 (1939); *United States v. Bashaw*, 152 U.S. 436 (1894). Furthermore, when OE was finally given power to employ the penalty in 1978, its power was restricted by detailed procedural safeguards which included an opportunity to appeal adverse agency rulings as well as the requirement that the agency implement hearing procedures through regulation. 20 U.S.C.A. § 2835 (Supp. 1982). The force of the penalty was further softened by a provision that up to 75% of the amount found reimbursable could be returned if an LEA corrected its program. 20 U.S.C.A. § 1234e (Supp. 1982). These limitations demonstrate Congress's ever present overriding concern for the welfare of the grantees and beneficiaries of the program. Although ready to try stricter enforcement methods, Congress's major focus was still on correction and the continuation of a strong program, and not on an alternate source of revenue for the federal treasury.

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[22] Brief for Petitioner at 19, 23.

[23] Transcript of prehearing argument before the Title I Audit Hearing Board, Pa. App. 10a, and from Memorandum in Support of Appellee's Motion to Dismiss, California State Board of Education v. Boyer, No. 78-3385 (9th Cir. Nov. 1, 1979), Pa. App. 13a. The Ninth Circuit dismissed the case pursuant to the agency's motion.

It is apparent in the statutory scheme of Title I that there is neither a basis in the structure upon which an implied penalty can be built nor any interstice in the fabric through which a common law penalty can arise. Congress well knew how to provide such a penalty if it wished. *United States v. Union Pacific R.R. Co.*, 98 U.S. 569, 616 (1878). It had, after all, provided such remedies before Title I was originally enacted,[24] in the same Elementary and Secondary Education Act of 1965 of which Title I was a part,[25] and in the 1978 Amendments to Title I itself. 20 U.S.C.A. § 2835 (Supp. 1982). It is quite clear that for such a severe penalty Congress would not and did not rely on the assumption that the agency possessed such a power through some other source. *Milwaukee v. Illinois*, 451 U.S. 304 (1981). In demanding reimbursement of grant funds, the agency has departed from its statutory mandate and exceeded its authority. *California v. Block*, 663 F.2d 855 (9th Cir. 1981). Its actions are therefore without force and cannot be given effect.

## II. THERE IS NO INHERENT OR IMPLIED RIGHT TO REIMBURSEMENT OF EXPENDED GRANT FUNDS.

### A. The Inherent Right to Repayment is Limited to Cases of Erroneous Payments.

The inherent authority of the federal government to collect erroneously or illegally paid funds is inapplicable to the present case. The rule of inherent authority exists independently of, and consistently with, the requirement that agencies derive their power from authorizing statutes. The error in the agency's thinking in confusing

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[24] *See, e.g.*, the Second Morrill Act of 1890, 7 U.S.C.A. § 325; School Construction in Areas Affected by Federal Activities Act, 20 U.S.C.A. §§ 637(b), 641.

[25] 20 U.S.C.A. § 847 (1974).

these two principles lies in its misconception of what constitutes an erroneous payment.[26]

In each of the cases cited by the petitioner, an agency exercised inherent power, as opposed to statutory power, for the collection of money only in cases where a clear error was made in connection with the payment. Erroneous payments in these cases were always made by the federal government itself, through its officials, by virtue of mistakes such as miscalculation, accidental overpayments, or payments based on fraudulent information or willfully withheld information.

In the present case, the grants sought to be recovered were not paid on the basis of a miscalculation or a fradulent representation or as a result of any illegality or mistake. The Title I grants to Pennsylvania during the years in question were calculated correctly on the basis of proper applications by LEAs for legitimate Title I programs. Even if it happened that later on auditors disputed the broad focus of an LEA's Title I program, or criticized the source of data for some schools designated as eligible by the LEA, expenditures of grant funds by a beneficiary LEA on its Title I program cannot be said to render the original grant of funds an erroneous payment. *See Butte, Anaconda & Pacific Ry. v. United States*, 290 U.S. 127 (1933); *United States v. Bank of Metropolis*, 40 U.S. 377, 401 (1841); *United States v. Russell Mfg. Co.*, 349 F.2d 13, 16-18 (2d Cir. 1965).

Whereas an adminisrative agency has the power to collect overpayments on miscalculated tax refunds without benefit of statutory authority, it must still look to its authorizing statute for the power to enforce grant conditions. Under no authority does an instance of noncompliance in the Title I program immediately turn the grant to a debt collectible by any means known to common law.

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[26] Brief for Petitioner at 15.

The status of properly paid grant funds and the rights and obligations of the parties to a grant are at all times determined by the statute.

The logical basis for any assertion of inherent authority to collect erroneous payments is to prevent unjust enrichment of the recipient with funds he has no right to retain. Where there is no enrichment to the recipient of the payment, the reason for the rule fails. *United States v. Hadden*, 192 F.2d 327 (6th Cir. 1951); *United States v. Systron-Donner Corp.*, 486 F.2d 249 (9th Cir. 1973). In the present case, the SEA and the LEAs were endeavoring to implement effective Title I programs. They neither retained grant money nor used the funds to further their own purposes. Funds were passed from the SEA to the LEAs according to law and used to conduct programs for the education of the disadvantaged which would not otherwise have been offered. The Title I program offered in Pennsylvania was supplementary to the regular program of instruction provided through expenditure of state and local funds.[27]

Far from bringing financial enrichment to the state or LEAs, Title I is and was an expensive program for the state grantee and the LEA beneficiaries. The requirement that LEAs maintain the same fiscal effort expended on their regular program of instruction during the two years preceding each year that Title I is offered, freezes education expenditures at the highest level reached over those years. 20 U.S.C.A. § 241g(c)(2).

Furthermore, contrary to repeated assertions throughout petitioner's brief, neither the state nor the LEAs retained Title I funds. Rather, the grant was completely

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[27] The grant funds at issue were not used to supplant local funds and thus reduce the tax burden of the school district, as alleged in petitioner's brief at 18. Supplanting is a separate violation, 45 C.F.R. § 116.17(h) (1972), which was not alleged in the present case.

expended on programs designed to educate the disadvantaged. Therefore, no hoard of wrongfully retained money exists against which to assert the assumed offset power. Any setoff of funds will have to be against future program money. As was foreseen by the Third Circuit, such a remedy causes grave injury to Congressional objectives. Pet. App. 22a. Hypothetically, the program would then suffer twice: once, possibly, when the disputed expenditures were made and again, definitely, when the penalty reduces the program.

Alternatives suggested in petitioner's brief at 20 and 21 impose a double penalty on states by coupling loss of federal funds with required additional expenditures of state and local funds to meet the shortfall. 2 R. Cappalli, Federal Grants and Cooperative Agreements, § 8:20 (1982). If the state or LEA is required to repay money from some source other than the Title I program, or meet program goals by increasing its fiscal effort, which amounts to the same thing, the double penalty is assessed. Such financial injury might cause ultimate loss of the program when the already impoverished LEA finds Title I too expensive to maintain. In any event, such control over state appropriations for education by a federal agency constitutes unacceptable interference in the government of a sovereign state without statutory authorization by Congress. *See* Brown, *Federal Funds and National Supremacy: The Role of State Legislatures in Federal Grant Programs*, 28 Am. U. L. Rev. 279 (1979); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 Yale L.J. 1694 (1981).

Although Pennsylvania has not been unjustly enriched by its Title I program, the federal treasury would receive an unjustified windfall if reimbursement were permitted. A supplementary education program would have been provided pursuant to Congress's wishes and the grant funds which were appropriated to support it would

be returned to the treasury. No justification for such a result has been demonstrated.[28]

Disputes regarding the expenditure of grant funds are therefore inappropriate for the exercise of any inherent authority an agency possesses to collect debts without resort to statute or litigation.[29] The corollary rule that Congress must explicitly enact a barrier to prevent an administrative agency from acting on its own to collect money by any means whatever[30] is also inapplicable. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). On the contrary, explicit statutory prohibitions are not required to restrain agency actions to the boundaries of the law. When Congress has addressed a question, the need to resort to secondary sources of authority, such as implication or common law, vanishes.

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[28] Although Pennsylvania's Title 1 programs did not enrich it financially, the programs did provide enrichment to the education of the disadvantaged. This type of enrichment cannot be referred to as unjust, however, nor should it be subject to a financial penalty. It was, after all, the purpose of the grant to provide just such programs. The panel of the Title I Audit Hearing Board which heard Pennsylvania's case was constrained by no standard of substantiality which may have avoided a finding that the Title I programs were in violation of the regulations, but it did recognize the value of the program. "The testimony of the McKeesport pesronnel displayed sufficient sensitivity to the needs of those students identified as slow learners to make it difficult to characterize the entire program as one which was designed 'merely' to serve the entire schools . . . [The parties failed to agree on a settlement] to reduce the financial penalty assessed many years after the fact against the school district that, in admittedly difficult circumstances, failed to follow the letter of the law." Pet. App. at 73a.

[29] In its opinion below, the Third Circuit noted how the agency's chosen method of enforcement defeated Congressional objectives with the double penalty as well as how the cases relied upon failed to support the inherent power claimed by the agency. Pet. App. 22a-23a.

[30] Brief of Petitioner at 23.

> Thus, the question was whether the legislative scheme "spoke directly to a question" . . . not whether Congress had affirmatively proscribed the use of federal common law. Our "commitment to the separation of powers is too fundamental" to continue to rely on federal common law "by judicially decreeing what accords with 'common sense and the public weal' " when Congress has addressed the problem.

*Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981), *quoting TVA v. Hill*, 437 U.S. 153, 195 (1978). The statutes raised by the petitioner therefore are not to be searched to find whether they raise barriers to some unrestricted authority of the agency, but should be read to determine whether in addressing the issue of enforcement Congress expressly provided for reimbursement of expended funds.

### B. The Title I Law Does Not Support a Right to Repayment.

The Title I statute in effect at the time the programs were conducted contained neither the expression nor the implication of reimbursement authority. The General Education Provisions Act (GEPA) contains a general requirement that grant recipients keep records for audit by the federal government. 20 U.S.C.A. § 1232c. GEPA also contains authority to adjust grant payments on account of overpayments or underpayments.[31] 20 U.S.C.A. § 1232d. Clearly, neither of these sections contemplates reimbursement.

Section 1232d, titled "Payments," concerns the manner in which the grant funds are to be paid to the recipient from the federal agency. The adjustments to be made on account of overpayments refers to unexpended and excess funds held by the recipient from prior grants. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965]

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[31] Petitioner argues that these sections support his claim for reimbursement. Brief of Petitioner at 31-34.

U.S. Code Cong. & Ad. News 1459-1460.[32] Similarly, there is no suggestion in § 1232c that the audits referred to would result in reimbursement. In light of the Third Circuit's discussion in its Opinion, Pet. App. 17a, it is unnecessary to enumerate all the purposes besides reimbursement for which audits would be necessary or useful.

The statute of limitations passed in 1974 also fails as authority for the reimbursement of Title I grant funds. Statutes of limitations are not grants of new rights or powers but are limitations on existing rights or powers. The intent of this statute was to limit any powers the agency had to affect the grants under its control and it was designed for the benefit of the grant recipients. *United States v. Wurts*, 303 U.S. 414 (1938). Such a section cannot be used to extend authority beyond what is provided in proper authorizing sections.

It must be remembered that the statute of limitations is part of GEPA and is generally applicable to all education grant programs, some of which have repayment sanctions.[33] Its limitation is therefore expressed in generally inclusive terms. As it relates to Title I, its effect is to restrict the agency's power to adjust payments under the grant pursuant to 20 U.S.C.A. § 1232d, concerning overpayments, to the period specified. Furthermore, this section was passed in 1974, subsequent to the operation of the programs in question, and therefore, even if it did constitute authority for reimbursement, could not be applied retroactively to affect programs previously concluded.[34]

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[32] As the Third Circuit noted in its Opinion, Pet. App. 17a, 18a, this reading of the law is supported by the 1978 Amendments which contain both the payment provision and the reimbursement remedy. 20 U.S.C.A. §§ 2841, 2835 (Supp. 1982). To avoid reading redundancies into the Act, the payment provision must be given a different construction than that advanced by the agency.

[33] *See* this Brief at nn.20, 25, *supra*.

[34] *See* Section III of this Brief at 41, *infra*.

The agency's belief that it was entitled to reimbursement of expended grant funds was never reduced to regulation. Despite Congress's concern for specificity, authority, and uniformity in its conduct and pronouncements, OE never published in the *Federal Register* the enforcement procedure for which it argues in this case. The GEPA statute in effect at the time the disputed programs were in operation required OE to publish any "rule, regulation, or requirement of general applicability prescribed for administration of any applicable program" thirty days before it was to take effect. Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970), § 421(b), Pa. App. 7a. To ensure that such rules were authorized, OE was required to cite to the exact statute or authority upon which it relied for its power. *Id.* § 421(a). Congress recognized the need for published rules as a means for insuring fairness and consistency in the administration of such a broad program as Title I. *Id.* § 421(c).[35] In the absence of statutory authority, or even regulations purporting to establish an allegedly implied power, the agency has no basis on which to exercise its demand for repayment.

### C. The Federal Claims Collection Act Does Not Support a Right to Repayment or Offset.

Similarly, the Federal Claims Collection Act of 1966 cannot substitute for the essential power that the agency lacks.[36] 31 U.S.C.A. §§ 951-953. The Act is not authority for rights or obligations which do not otherwise exist. It was enacted to correct a specific problem: law existing

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[35] The Administrative Procedures Act provides further authority for the requirement that agency action of such import as the imposition of sanctions requires not only formal rulemaking processes but clear legal authorization. 5 U.S.C.A. §§ 551, 553, 558. The rulemaking exception relating to grants, 5 U.S.C.A. § 553(a)(2), was voluntarily waived by HEW in recognition of the importance of public participation in rulemaking. 36 Fed. Reg. 2532 (1971).

[36] Brief for Petitioner at 24-28.

at the time of its enactment prevented or severely limited agencies from handling their own collection cases. Its stated purpose was to authorize agencies to compromise certain claims. S. Rep. No. 1331, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2532, 2536. Its intent was to provide "for a more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government." *Id.* at 2533. The Act overcame the cumbersome, time-consuming, and expensive requirement pervasive in the law that agencies refer their collection cases to the General Accounting Office by permitting, in § 3(a),[37] collection by agencies themselves and by permitting, in § 3(b),[38] the compromise of claims.

The Act unequivocally requires that authority to assert the claim in question be granted through some other statute. Section 4 of the Act[39] provides that "nothing in this chapter shall increase . . . the existing authority of the head of an agency to litigate claims . . . ." The legislative history pertaining to § 4 goes on to note that the new authority to compromise claims does not "change the statutory basis of such existing authority." S. Rep. No. 1331, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2534. Statutory authority for the claim is therefore separately required before the Federal Claims Collection Act can be used by the agency to attempt collection or compromise of the matter. *Cf. Colorado v. VA*, 602 F.2d 926 (10th Cir. 1979), *cert. denied*, 444 U.S. 1014 (1980).

The Federal Claims Collection Act was recently amended by the Debt Collection Act of 1982. Pub. L. No. 97-365, 96 Stat. 1749 (1982). This amendment removes

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[37] 31 U.S.C.A. § 952(a).

[38] 31 U.S.C.A. § 952(b).

[39] 31 U.S.C.A. § 953.

all possible doubt that § 3(a) (31 U.S.C.A. § 952(a)) does not authorize the agency to recoup or offset its claims against a state's grant funds. The power to collect claims under § 3(a) by means of administrative offset is explicitly provided in a new section of the Federal Claims Collection Act[40] which simultaneously explicitly excludes states from its reach. Pub. L. No. 97-365, § 10, 96 Stat. 1749.[41]

The new amendments to the Federal Claims Collection Act are designed to provide agencies with specific tools to cope with the increasing backlog of delinquent debts owed to the United States.[42] The explicit focus on private and individual debtors is consistent with the intent expressed in the legislative history to the Federal Claims Collection Act of 1966 that the collection and compromise authority therein provided be for the purpose of resolving claims relating to individuals. S. Rep. No. 1331, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 2533.

The agency's misplaced reliance on the Federal Claims Collection Act and the Debt Collection Act demonstrates

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[40] Section 10 of the Debt Collection Act of 1982, Pub. L. No. 97-365, § 10, 96 Stat. 1754, amends the Federal Claims Collection Act of 1966, 31 U.S.C.A. §§ 951-953, by adding a new section 5.

[41] Section 5(e)(2) of the Federal Claims Collection Act, added by the Debt Collection Act of 1982. Interestingly, states are also excluded from the new provision for interest and penalty on indebtedness to the United States added to § 3 of the Federal Claims Collection Act, 31 U.S.C.A. § 952 (1976), in the new sub-section (e)(8) added by the Debt Collection Act of 1982, Pub. L. No. 97-365, 96 Stat. 1756.

[42] The claims with which Congress is concerned are discussed in the legislative history to the Debt Collection Act. By far the largest portion of the debt which is the subject of the collection powers expressed in this Act is in the form of loan receivables. S. Rep. No. 97-378, 97th Cong., 2d Sess., *reprinted in* [1982] U.S. Code Cong. & Ad. News 3378. Other debts mentioned were interest and unpaid taxes. The only reference to program beneficiaries was in connection with an insignificant portion of delinquent debts and referred to over-payments. *Id.* at 3379.

its persistent effort to treat state grantees as if they were individuals, but without the legal protections obtaining to individuals, and to treat grants as if they were merely contracts for services. Although grants have attributes of contracts and it is sometimes useful to view them in that light,[43] public grants are not in every respect coincident with contracts for goods or services.

Generally, a relationship between the federal government and the state government is contractual when the principal purpose is the acquisition of property or services for the direct benefit of the federal government. A grant, on the other hand, has as its principal purpose the transfer of money to the state to accomplish a public purpose beneficial to some third interest. In a grant, no substantial involvement of the federal government is expected. *Compare* Federal Grants and Cooperative Agreements Act of 1977, 41 U.S.C.A. § 503 (Supp. 1982) *with* 41 U.S.C.A. § 504 (Supp. 1982). Grant funds pursuant to the purpose of a grant statute, even if they are spent in error, cannot automatically be considered debts to the federal treasury. Grants do not create a financial interest in the federal agency but look to a broader purpose and another beneficiary. *Oregon & California R.R. v. United States*, 238 U.S. 393, 410 (1915); *United States v. Union Pacific R.R.*, 98 U.S. 569 (1878). The analogy between grants and contracts, while useful, is not perfect, and to assign noncompliance in grant programs the status of debts to the grantor agency requires statutory authority.

**D. Clear Expression of Grant Conditions is Required.**

The unexpressed intent of Congress provides no basis for conditioning the grant of federal funds to states. In *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), this Court insisted that Congress speak

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[43] Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981).

with a clear voice in fixing the terms on which it disbursed federal money to the states pursuant to grants. "[I]f Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* at 17.

In reaching this result, the Court considered the effect that the imposition of Congressional policy has on areas of traditional state sovereignty.[44] As a result, it expressed a reluctance quickly to attribute to Congress an unstated intent to impose affirmative obligations on the states.[45] "The case for inferring intent is at its weakest where, as here, the rights asserted impose affirmative obligations on States to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States." *Id.* at 16-17.

Congress's power to impose conditions on states through the medium of federal grants is based on the states' voluntary participation in the grant program.[46] Acceptance

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[44] As noted by the Third Circuit, Pet. App. 5a-7a, 17a, education is an area which has historically been entrusted to local control. Board of Education v. Rowley, No. 80-1002 (U.S. June 28, 1982). Grant programs involving sovereign states must operate within the tripartite system of government. Pet. App. 12a, 13a, 24a.

[45] The petitioner's intention to impose affirmative obligations through the requirement of reimbursement of grant funds is revealed in his brief at 20, 21, in his suggestion that the state be required to make direct payment to the federal government from its treasury in the amount of past grants or that the state be required to maintain a Title I program pursuant to agency direction at its own expense.

[46] Voluntary participation in grant funding schemes is a concept developed years ago in connection with early grants. Quern v. Mandley, 436 U.S. 725, 734 (1978); James v. Valtierra, 402 U.S. 137, 140 (1971); Massachusetts v. Mellon, 262 U.S. 447, 482 (1923). The concept of voluntariness is becoming a fiction as states become more dependent on the huge sums offered under federal grant programs to provide necessary services. The financial realities dictated by the interaction of the taxation and funding practices of the

cannot be voluntary if the conditions of a grant are secret or if a state is unable to ascertain the consequences of its participation. *Id.* at 17. For a state to make the informed choice that is required, Congress's intent to impose conditions must be expressed and expressed clearly. "The crucial inquiry . . . is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the State could make an informed choice." *Id.* at 25. Knowing acceptance in the present case requires not only express provision of the program requirements but also express notice of the consequences when errors in program implementation occur. When a program the size of Title I is designed to be conducted by thousands of people at hundreds of diverse localities, errors can be expected.

Considering the Title I statute in light of the principles expressed in *Pennhurst*, there is no suggestion, express or otherwise, that the states would be liable to reimburse the federal government for prior grants if errors in their administration were discovered. Regardless of the plain language of the statute, however, the petitioner cites isolated provisions of legislative history and the agency's own opinion that reimbursement of prior grants would be a good way to resolve some of the financial concerns of Congress. Brief for Petitioner at 33, 35.

In light of the finely tuned mechanism structured in the Title I statute, it is unlikely that Congress would rely on unexpressed intent to impose a penalty so severe that it overwhelms and precludes use of remedies expressly provided in the statute. In *Pennhurst*, this Court looked to the purpose of the grant and its structure as a whole to construe its meaning. In so doing, it found that

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federal government might make rejection of "voluntary" grant programs a practical impossibility on the part of the states. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 Colum. L. Rev. 847 (1979).

the express prevailed over the implicit and the whole over its parts.

> Surely Congress would not have established such elaborate funding incentives had it simply intended to impose absolute obligations on the States.
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> . . . "In expounding a statute we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

*Id.* at 18, *quoting Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). Similarly, in the present case, isolated segments of legislative history present too thin a reed to support imposition of the severe sanctions the agency would read into the margins of the law.

Petitioner's reliance on legislative history [47] is also misplaced under standard principles of statutory construction. Legislative history is not law and cannot substitute therefor when the sought-after provisions are absent from the statute. When a statute is plain and unambiguous, courts do not look to legislative history as a guide to its meaning. *TVA v. Hill*, 437 U.S. 153 (1978); *Ex parte Collett*, 337 U.S. 55, 61 (1949). When legislative history is considered, it is read to clarify existing provisions of the law, not to obfuscate an explicit statutory scheme with unexpressed innuendos.

In the present case, the agency has cited history which suggests that the Senate Committee on Labor and Public Welfare was aware of OE's practice of attempting to recover grant funds. Whatever this knowledge meant to the Committee, authorization for that practice never made it into the law. Administrative errors are not self-validating, and the agency's practices remain unauthorized. *SEC v. Sloan*, 436 U.S. 103 (1978); *Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978);

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[47] Brief for Petitioner at 28-31, 33.

*Dixon v. United States*, 381 U.S. 68, 78 (1965); *United States v. San Francisco*, 310 U.S. 16, 31-32 (1940).

Other legislative history accompanying later acts of Congress is read by the petitioner as a subtle effort to clarify retroactively OE's authority over previously concluded grant programs. Subsequent legislative action cannot change the intent of previously enacted statutes, and the views of one Congress form a hazardous basis for interpreting prior laws of another Congress. *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Waterman S.S. Corp. v. United States*, 381 U.S. 252 (1965); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963); *United States v. Price*, 361 U.S. 304 (1960).

Furthermore, other reports of Congress suggest a contrary conclusion. Congress has repeatedly, and with progressively more force, commented on the need to place controls on the Office of Education and confine its activities to the explicit terms of the statute. H. Rep. No. 93-805, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4154-55. Regulations of this agency have been statutorily subjected to Congressional review and have been vetoed on at least two occasions recently for noncompliance with the statute. Congress's continuing struggle to restrain the agency to the boundaries of the law has most recently taken the form of a statutory provision severely curtailing the Secretary's authority to regulate and depriving regulations issued of legal significance.[48]

Congressional concern for the education of the disadvantaged and its direction that federal, state, and local governments work together to accomplish the purpose of Title I is certainly a more pervasive theme in the rele-

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[48] 20 U.S.C.A. § 3871(c) (Supp. 1982). This section provides that "[r]egulations issued pursuant to this sub-title shall not have the standing of a federal statute for the purposes of judicial review."

vant Congressional reports than are any suggestions that a reimbursement penalty was intended. On the contrary, Congress's intent was strongly expressed that the agency abide by the terms of the statute as it was written. *See United States v. San Francisco*, 310 U.S. 16 (1940).

## III. THE EDUCATION AMENDMENTS OF 1978 DO NOT AUTHORIZE IMPOSITION OF A REIMBURSEMENT PENALTY IN THE PRESENT CASE.

### A. The 1978 Amendments are Not Applicable to the Present Case.

There is no legal authority for the proposition that penalties enacted in the Education Amendments of 1978 apply to Title I programs concluded in 1973. Secretary Bell cites *Bradley v. School Board*, 416 U.S. 696 (1974), and cases with similar holdings, for the principle that an appellate court is to apply the law in effect at the time it renders its decision unless doing so would result in manifest injustice. The appellate court, in applying this principle, does not consider whether the lower tribunal correctly decided the matter based on the prior law, but instead considers the matter anew in light of the intervening law. *Cort v. Ash*, 422 U.S. 66 (1975); *United States v. Schooner Peggy*, 5 U.S. 102 (1801). If this Court were to apply the principle urged by Secretary Bell, it would have to look to the law in effect on the day it renders its decision and, whatever the law might be at that time, it most certainly will not be the Education Amendments of 1978.

In the everchanging picture of Title I, now Chapter 1, the Education Amendments of 1978 were superseded by the Education Consolidation and Improvement Act. Chapter 1 of the ECIA contains no express repayment penalty; its enforcement provisions are limited to a section providing for withholding of funds on much the same terms as the early Title I statute. 20 U.S.C.A. § 3872 (Supp. 1982). Because all provisions of Title I not specifically made applicable by Chapter 1 are now inap-

plicable, the repayment provisions of the 1978 Amendments have been superseded and cannot be applied. 20 U.S.C.A. § 3803(c) (Supp. 1982).

As has been noted above, details of the Title I program have historically been amended with frequency and regularity. Amendments to the new ECIA have already passed both houses of Congress, but were vetoed by the President.[49] It is only a matter of time until new amendments render obsolete the current provisions of Chapter 1. Therefore, this brief cannot discuss with any assurance the law that will be in effect at the time this Court renders its decision.

Since the present law is so uncertain, the better rule in this case is to apply the law in effect at the time Pennsylvania accepted the grant funds and operated the programs in question. This rule is supported by the strong presumption that statutes are not meant to act retrospectively, *United States v. Security Industrial Bank*, No. 81-184 (U.S. Nov. 30, 1982); *U.S. Fidelity Co. v. Struthers Wells Co.*, 209 U.S. 306 (1908), and equally by the principle expressed in *Pennhurst* that, in order for a state to give effective consent to grant conditions, there must be a clear expression by Congress of the terms to which a state will be held. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981).

In the interests of justice, legislation has always been considered to be addressed to the future, not to the past, absent unequivocal expression to the contrary in the terms of the statute. *Greene v. United States*, 376 U.S. 149 (1964); *Brewster v. Gage*, 280 U.S. 327 (1930); *Union Pacific R.R. v. Laramie Stockyards Co.*, 231 U.S. 190 (1913). The rule protects the rights and legitimate expectations established by the law in effect at the rele-

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[49] Press Release from Office of Press Secretary at the White House, Memorandum of Disapproval of H.R. 7336, ECIA, signed by Ronald Reagan, President (January 12, 1983).

vant time and "prevents the assigning of a quality or effect to acts or conduct which they did not have or did not contemplate when they were performed." *Union Pacific R.R. v. Laramie Stockyards Co., id.* at 199. These considerations are particularly relevant when the new law proposed for retroactive application attaches penalties to past conduct.

Pennsylvania accepted the grants for the years in question according to known conditions that did not include reimbursement of grant funds which were subsequently determined to be improperly spent. Pennsylvania's program was operated for years without either of the statutorily prescribed methods of enforcement being used against it. It is contrary to accepted law and unfair to Pennsylvania to require, at this time, a direct payment from the state to the federal agency by virtue of a statute passed five years after termination of the last program in question. *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981); *Brewster v. Gage*, 280 U.S. 327 (1930).[50]

### B. Although Penalties are Prospective Only, Remedial Provisions can be Retroactively Applied.

Remedial laws, laws that confer a benefit, or those which are procedural only, are typically applied retroactively.[51] A new penalty added to the law or a change in enforcement mechanism, however, cannot be considered

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[50] A close reading of the terms of the 1978 Amendments reveals that a prospective application is required. The section providing for reimbursement of grants based on audit exceptions requires that the Commissioner adopt procedures to resolve audit disputes, which include establishing an appeals process, before allegedly misspent funds can be collected. 20 U.S.C.A. § 2835(b) (Supp. 1982). Because the requirement to collect misspent funds clearly depends upon the use of resolution procedures not in place when the statute was passed, a prospective application is the only interpretation possible. Brewster v. Gage, 280 U.S. 327 (1930).

[51] Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297 (1937); Hallowell v. Commons, 239 U.S. 506 (1916).

simply a procedural change in a grant-in-aid statute. *Claridge Apartments Co. v. Commissioner*, 323 U.S. 141, 164-65 (1944). Pursuant to *Pennhurst*, states must understand the consequences of their actions if their participation in the grant program is to be considered an effective acceptance of the conditions in the grant. The penalty provisions of the Education Amendments of 1978 cannot be considered mere procedural changes for purposes of retroactive application.

In 1981 the ECIA entrusted more discretion to the local school districts and provided for significantly fewer regulatory restrictions by severely curtailing the Department of Education's ability to promulgate regulations. There is no question that these relaxed standards represent curative legislation which is applicable retroactively. *Bradley v. School Board*, 416 U.S. 696 (1974); *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937). Nevertheless, since the penalty provisions included in the 1978 Amendments interfere with established rights and legitimate expectations of the state grantees when they entered the program, they would be subject to a different standard and would not be applied retroactively.

Under the relaxed standards of the ECIA, Pennsylvania's Title I programs during the years in question would be in full compliance with the law. Yet Secretary Bell has not argued for the retroactive application of these sections of the law. Instead, he has taken the completely unsupportable position that only the penalty provisions of the 1978 Amendments be applied retroactively. The 1978 Amendments, are, of course, neither the law in effect at the time this Court is rendering its decision nor the law applicable to Pennsylvania's Title I grant at the time it was accepted and implemented, but they do contain a feature that seems to appeal to the Secretary: the most severe penalty written into the law to date.

The Secretary has, in fact, taken a position in other federal courts completely inconsistent with the one he

assumes before this Court with respect to the retroactivity of the 1978 Amendments. In the Ninth Circuit, OE argued that the 1978 Amendments were not retroactively applicable to entitle California to an appeal of an adverse decision by the Title I Audit Hearing Board. Memorandum in Support of Appellee's Motion to Dismiss, at 8, 9, *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979), Pa. App. 13a. OE's position prevailed and California's appeal was dismissed for lack of jurisdiction. *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979). Similarly, in its brief to the Fourth Circuit in *West Virginia v. Hufstedler*, No. 79-1338 (4th Cir. Nov. 4, 1980), Pa. App. 12a, the agency argued against retroactive application of the 1978 Amendments. Brief of Respondent at 16-17, *id.*

Apparently, the Education Department's desire to see the most punitive sanctions that were ever enacted in Title I law coupled with the strictest compliance standards has led to some confusion in its thinking about retroactivity. The flexibility that the Department permits itself with regard to the law, however, is at odds with the strict adherence that is expected from the grantees. The Department's creativity on the subject of penalties would more appropriately be channelled into the substance of the programs it administers. Enforcement methods are properly restricted to the terms of the grant statute at the time it was accepted and implemented by the state recipient.

We are concerned here with grants enacted to support national goals. To achieve their beneficial purpose, federal grants depend on evenness of application and predictability of enforcement. The liberal generosity that characterizes grants makes an exact and consistent reading of the statutory words that give them substance imperative and analogy to legal principles that are designed to effectuate self-interested monetary transactions par-

ticularly inappropriate. All that is required in this case is application of the law as it was written by Congress. The law is clear and complete. The result to which it points is fair and has the virtue of certainty. This law should be given effect so that it might effectuate its purpose.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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# APPENDIX

## I. Statutes and Regulations Involved

A. Title 1 of the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, § 2, 79 Stat. 27 (superseded by Education Consolidation and Improvement Act of 1981, 20 U.S.C.A. §§ 3801-3876 (Supp. 1982)), relevant provisions printed at:

20 U.S.C.A. § 241a (1974):

§ 241a. Congressional declaration of policy

In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local education agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children.

20 U.S.C.A. § 241f(b) (1974), providing in part:

§ 241f. Assurances from States; action by Commissioner on applications

* * * *

(b) The Commissioner shall approve an application which meets the requirements specified in subsection (a) of this section, and he shall not finally disapprove an application except after reasonable notice and opportunity for a hearing to the State educational agency.

20 U.S.C.A. § 241j (1974):

§ 241j. Withholding funds for non-compliance with assurances

Whenever the Commissioner, after reasonable notice and opportunity for hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State approved under section 241e(c) or 241f(b) of this title, the Commissioner shall notify the agency that further payments will not be made to the State under this subchapter (or, in his discretion, that the State educational agency shall not make further payments under this subchapter to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, no further payments shall be made to the State under this subchapter, or payments by the State educational agency under this subchapter shall be limited to local educational agencies not affected by the failure, as the case may be.

20 U.S.C.A. § 241k(a) (1974), providing in part:

§ 241k. Judicial review—Jurisdiction

(a) If any State is dissatisfied with the Commissioner's final action with respect to the approval of its application submitted under section 241e(c) or 241f(b) of this title or with his final action under section 241j of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

* * * *

B. Title I Regulations

45 C.F.R. § 116.17 (1972), providing in part:

§ 116.17 Project covered by an application.

(a) An application for a grant under Title I of the Act by a local educational agency (other than a State agency directly responsible for providing free public education for handicapped children or for children in institutions for neglected or delinquent children) shall set forth a project for educationally deprived children residing in a project area composed of school attendance areas having high concentrations of children from low-income families or a project for serving children living in institutions for neglected or delinquent children, which project shall have been designed specifically to meet special educational needs of those educationally deprived children. The project itself shall be carried out at locations where the needs of the educationally deprived children can best be served. It may involve the participation of educationally deprived children residing outside the project area if such a participation will not dilute the effectiveness of the project with respect to children residing in the project area.

• • • •

(c) Each application for a grant under Title I of the Act by such a local educational agency, other than an application for a grant for planning, shall designate the project area or the institution or special school for which the project is designed. A project area may include one or more attendance areas having high concentrations of children from low-income families, but the project area must be sufficiently restricted in size in relation to the nature of the project as to avoid jeopardizing its effectiveness in meeting the aims and objectives of the project. Each such application shall describe the special edu-

cational needs identified with educationally deprived children residing in the project area at which the project is directed. Each local educational agency shall design its projects in such a manner, and apply them to such school attendance areas having high concentrations of children from low-income families, as will best meet the special educational needs of the educationally deprived children.

(d) A school attendance area for either a public elementary or a public secondary school may be designated as a project area if the estimated percentage of children from low-income families residing in that attendance area is as high as the percentage of such children residing in the whole of the school district, or if the estimated number of children from low-income families residing in that attendance area is as large as the average number of such children residing in the several school attendance areas in the school district. In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children and be approved as a project area, but only if there are no wide variances in the concentrations of such children among the several school attendance areas in the school district.

* * * *

(f) The project for which an application for a grant is made by a local educational agency should be designed to meet the special educational needs of those educationally deprived children who have the greatest need for assistance. However, none of the educationally deprived children who are in need of the special educational services to be provided shall be denied the opportunity to participate in the project on the ground that they are not children from low-income families or on the ground that they are not attending school at the time.

(g) Each such project must be tailored to contribute particularly toward meeting one or more of the special educational needs of educationally deprived children and should not be designed merely to meet the needs of schools or of the student body at large in a school or in a specified grade in a school.

45 C.F.R. § 116.48 (1972):

§ 116.48 State fiscal control and audit.

(a) The State educational agency shall, for that agency and local educational agencies provide for such fiscal control and fund accounting procedures as may be necessary for the proper disbursement of funds paid to the State and to local educational agencies under Title I of the Act.

(b) All expenditures by local educational agencies or by State educational agencies of Federal funds granted under Title I of the Act shall be audited either by State auditors or by other appropriate auditors. The State educational agencies shall, with due regard for Federal auditing requirements, provide for appropriate audit standards for that purpose. The results of such audits shall be used to substantiate State agency records and shall be made available to Federal auditors. Federal auditors shall be given access to such records or other documents as may be necessary to substantiate the results of such audits.

45 C.F.R. § 116.52 (1972):

§ 116.52 Withholding by the Commissioner.

(a) Whenever the Commissioner, after reasonable notice and opportunity for a hearing to any State educational agency, finds that there has been a failure to comply substantially with any assurance set forth in the application of that State, or in the application of that State educational agency, approved

by the Commissioner, for a grant to establish or improve programs of education for migratory children of migratory agricultural workers, he will notify the agency that further payments will not be made to the State under Title I of the Act (or, in his discretion, that the State educational agency will not make further payments under Title I of the Act to specified local educational agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until the Commissioner is so satisfied, further payments under Title I of the Act will not be made to that State or payments by the State educational agency will be limited to payments to local educational agencies not affected by the failure, as the case may be.

(b) Prior to initiating a hearing under this section, the Commissioner will attempt to resolve any apparent differences between him and the State educational agency regarding the interpretation or application of the provisions of Title I of the Act and the regulations in this part, including any apparent differences with respect to the disposition of matters reported by the State educational agency pursuant to § 116.31(g). Nothing herein shall be deemed to prevent any State educational agency from seeking the advice of the Commissioner prior to disposing of such matters.

C. General Education Provisions Act Pub. L. No. 91-230, § 401(a)(10), 84 Stat. 169 (1970) (current version at 20 U.S.C.A. § 1232 (Supp. 1982)):

RULES: REQUIREMENTS AND ENFORCEMENT

SEC. 421. (a) Rules, regulations, guidelines, or other published interpretations or orders issued by the Department of Health, Education, and Welfare or the Office of Education, or by any official of such agencies, in connection with, or affecting, the ad-

ministration of any applicable program shall contain immediately following each substantive provision of such rules, regulations, guidelines, interpretations, or orders, citations to the particular section or sections of statutory law or other legal authority upon which such provision is based.

(b) No standard, rule, regulation, or requirement of general applicability prescribed for the administration of any applicable program may take effect until thirty days after it is published in the Federal Register.

(c) All such rules, regulations, guidelines, interpretations, or orders shall be uniformly applied and enforced throughout the fifty States.

D. Education Consolidation and Improvement Act of 1981, relevant provisions printed at:

20 U.S.C.A. § 3801 (Supp. 1982):

DECLARATION OF POLICY

SEC. 552. The Congress declares it to be the policy of the United States to continue to provide financial assistance to State and local educational agencies to meet the special needs of educationally deprived children, on the basis of entitlements calculated under title I of the Elementary and Secondary Education Act of 1965, but to do so in a manner which will eliminate burdensome, unnecessary, and unproductive paperwork and free the schools of unnecessary Federal supervision, direction, and control. Further, the Congress recognizes the special educational needs of children of low-income families, and that concentrations of such children in local educational agencies adversely affect their ability to provide educational programs which will meet the needs of such children. The Congress also finds that Federal assistance for this purpose will be more effective if education offi-

cials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program.

20 U.S.C.A. § 3802(c) (Supp. 1982), providing in part:

Applicability of Title I Provisions of Law

Sec. 554

* * * *

(c) APPLICABILITY RULE.—The provisions of title I of the Elementary and Secondary Education Act of 1965 which are not specifically made applicable by this chapter shall not be applicable to programs authorized under this chapter.

20 U.S.C.A. § 3871(c) (Supp. 1982), provides in part:

FEDERAL REGULATIONS

Sec. 591

* * * *

(c) Regulations issued pursuant to this subtitle shall not have the standing of a Federal statute for the purposes of judicial review.

20 U.S.C.A. § 3872 (Supp. 1982):

WITHHOLDING OF PAYMENTS

SEC. 592. (a) Whenever the Secretary after reasonable notice to any State educational agency and an opportunity for a hearing on the record, finds that there has been a failure to comply substantially with any assurances required to be given or conditions required to be met under this subtitle the Secretary shall notify such agency of these findings and that beginning sixty days after the date of such notification, further payments will not be made to the State under this subtitle, or affected chapter thereof (or, in his discretion, that the State educational agency shall reduce or terminate further pay-

ments under the subtitle or affected chapter thereof, to specified local educational agencies or State agencies affected by the failure) until he is satisfied that there is no longer any such failure to comply. Until he is so satisfied, (1) no further payments shall be made to the State under the subtitle or affected chapter thereof, or (2) payments by the State educational agency under the subtitle or affected chapter thereof shall be limited to local educational agencies and State agencies not affected by the failure, or (3) payments to particular local educational agencies shall be reduced, as the case may be.

(b) Upon submission to a State of a notice under subsection (a) that the Secretary is withholding payments, the Secretary shall take such action as may be necessary to bring his action to the attention of the public within the State.

E. Debt Collection Act of 1982 Pub. L. No. 97-365, § 10(2), 96 Stat. 1754-55 (1982), providing in part:

Sec. 5. (a) The head of an agency or his designee may, after attempting to collect a claim from a person under section 3(a) of this Act, collect the claim by means of administrative offset, except that no claim under this Act that has been outstanding for more than ten years may be collected by means of administrative offset.

* * * *

(e) For purposes of this section—

* * * *

(2) the term "person" does not include any agency of the United States, or of any State or local government.

**II. Excerpts from the transcript of prehearing arguments before the Title I Audit Hearing Board, Appeal of Pennsylvania, December 7, 1977, at 51-53. (Full transcript lodged with the Clerk of the United States Supreme Court as part of the record.)**

* * * *

[51] MS. HUNTING: It is my understanding from hearing the Office of Education discussion of this they are basically asserting we do not have a right to a [52] hearing. This is simply advice to the Commissioner. It appears to me from reading the statutes in this regard a hearing is provided for. We do have a right to some kind of hearing.

It does not say on the record, but some kind of hearing and we later have an appeal to the third circuit. It seems to me if we are appealing this to the third circuit we are doing this with no record whatsoever, if we are not granted a full evidentiary hearing.

MR. ARNOT: I would like to briefly respond by stating the provision which provides or requires a hearing and provides for appeal to a circuit court is not relevant here.

Those provisions concern withholding of funds or disapproval of an application, not the recovery of misspent Title I funds. They do not require a hearing in this situation, in this proceeding. They also do not provide the right of appeal to a circuit court, the case of withholding of funds or denial of approval of application.

Are we required to provide a hearing and do you have the right to appeal to the circuit court? If you want to argue by analogy to those two type situations and say we ought to have a hearing here, I set that analogy for whatever purpose and would respond by saying [53] you are receiving a hearing. The authority I would indicate I would provide on the fifth amendment the due process clause of the fifth amendment I can provide that if it is desired.

The courts have in a number of instances ruled without being overruled that States are not persons within the meaning of the fifth amendment and cannot assert fifth amendment claims of entitlement to due process, or fifth amendment entitlement on behalf of their citizenry.

MS. DONOVAN: May I ask one question. Suppose the Panel did everything I ask them to except say the Commissioner had no authority and said we would have a full evidentiary hearing and will follow administrative procedure type proceedings in the hearing. There is no appeal because it is a refund case and not a withholding?

You say there would be no right of appeal to the third circuit?

MR. ARNOT: No right of appeal.

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**III. Excerpts from Brief of Respondent, at 16-17, *West Virginia v. Hufstedler*, No. 79-1338 (4th Cir. Nov. 4, 1980). (Copy of complete brief lodged with the Clerk.)**

* * * *

Thus, the Finance Division's April 6, 1979 letter is not the "Commissioner's final action." Rather, the Commissioner's "final action" resolving West Virginia's audit appeal occurred on May 5, 1978 when he adopted the Panel's Initial Decision that $63,026 in title I funds had been misspent as his Final Decision. It is clear, therefore, that section 185 does not apply to West Virginia's audit appeal because it was enacted on November 1, 1978 —six months after the Commissioner's final action on May 5, 1978. As a consequence, unless the Education Amendments of 1978 are retroactively applied, section 195 does not confer jurisdiction on the Court.

It is a general rule of statutory construction that statutes are to be applied prospectively. *United States v. Estate of Donnelly*, 397 U.S. 286, 294 (1970). Only if there is clear statutory expression or legislative history to the contrary should a statute be retroactively applied. *Sea-Land Service, Inc. v. United States*, 493 F.2d 1357, 1369 (Ct. Cl.), *cert. denied*, 419 U.S. 840 (1974). However, nothing in the Education Amendments of 1978, or the accompanying legislative history, indicates that Congress intended section 195 to apply retroactively.

* * * *

**IV. Excerpts from Memorandum in Support of Appellee's Motion to Dismiss, at 8, 9, *California State Board of Education v. Boyer*, No. 78-3385 (9th Cir. Nov. 1, 1979). (Copy of complete Memorandum lodged with the Clerk.)**

* * * *

Thus, California's Petition for Review preceded both the enactment and the effective dates of this judicial review amendment. Additionally, the Petition for Review preceded both the enactment and effective dates of the GEPA amendment creating the Education Appeal Board, as well as the publication and effective dates of its implementing regulation.[4] For these reasons, the judicial review provision under the GEPA amendments cannot be invoked unless the pertinent GEPA amendments are retroactively applied.

The general rule of statutory construction is that statutes are only to be applied prospectively. *United States* v. *Estate of Donnelly*, 397 U.S. 286 (1970); *Sea-Land Service Inc.* v. *United States*, 493 F.2d 1357 (Ct. Cl. 1974), *cert. denied*, 419 U.S. 840 (1974). In the past, the Ninth Circuit Court of Appeals has followed the general rule of construction, absent a clear expression of legislative intent to the contrary. *Puget Sound Power & Light Co.* v. *Federal Power Commission*, 557 F.2d 1311 (9th Cir. 1977). Neither the Education Amendments of 1978 nor its legislative history indicates that Congress intended that the amendments to GEPA apply retroactively. Indeed, the very insertion of the provision concerning the effective dates of the amendments to GEPA clearly indicates that Congress intended that these amendments only apply after March 1, 1979.

Accordingly, this Court has no basis for exercising jurisdiction in this case, and therefore should enter an order dismissing the current appeal.

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[4] The creation of the Education Appeal Board by regulation was effective on June 29, 1979 (44 Fed. Reg. 30528).